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IN THE

SUPREME COURT OF THE UNITED STATES

October Term _____

Nos. 221 + 273

IRVING ROSS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

Supplemental Record

Petition for Rehearing

of Irving Ross, Appellant

Filed: June 18, 1952

JUN 8 1954

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IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 11429

IRVING ROSS, MARTIN ROSS AND MILTON GECKER, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

PETITION OF APPELLANT IRVING ROSS FOR REHEARING OR IN THE ALTERNATIVE FOR A STAY OF MANDATE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 11429

IRVING ROSS, MARTIN ROSS AND MILTON GECKER, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

PETITION OF APPELLANT IRVING ROSS FOR REHEARING OR IN THE ALTERNATIVE FOR A STAY OF MANDATE.

Comes now Irving Ross, one of the appellants in the above-entitled cause, and presents this his petition for rehearing or in the alternative for a stay of mandate, and in support thereof respectfully shows:

1. As to Count 2, Otto and Lula Mae Smith, the Court has failed to take into consideration the fact that the case

was submitted to the jury on the theory that it was Martin Ross and not Irving who took the credit information, and that the issue to be decided was whether Martin's account of that transaction or the Smith's account was to be accepted. In its rulings on the motions for judgment of acquittal at the close of the Government's case the trial court took the position as to the substantive counts that a defendant not shown to be present when the credit information was taken should be acquitted. On this basis Irving Ross was given a judgment of acquittal on Counts 4 and 6 (R. 331-332, 339, 340, 341). The motion as to Count 2 was denied at that time because Lula Mae and Otto Smith had given conflicting accounts as to which defendants were present when the credit information was taken (R. 333-336, 337, 340). The charge of the court on this aspect of Count 2 (R. 529-530) can only be construed as resolving the conflict in the testimony of the government's own witnesses by naming Martin as the Ross brother who took the credit data, so that the issue for the jury was whether his version of what occurred on that occasion should be accepted over the Smith's version. It is respectfully submitted that the jury's verdict should not be affirmed on a theory different from that on which the case was submitted to it, and that this Court has erred in relying on the conflicting identifications by the government's witnesses in order to place both the Ross brothers on the scene at the crucial time (Opinion, p. 8), when the government's witnesses themselves said that only one was there on that occasion.

2. In passing on the applicability here of the decision of the Supreme Court in *Sealfon* v. *United States,* 332 U. S. 575, this Court makes a distinction which is not justified by *Dunn* v. *United States,* 284 U. S. 390, on which this Court relies (Opinion, p. 3). In the *Dunn* case Mr. Justice Holmes made it plain that there is no distinction so far as the applicability of the rule of *res judicata* is concerned between separate trials of separate indictments and the

trial of several offenses separately charged in the counts of a single indictment. 284 U. S. at 393. Since *Sealfon* established conclusively that the bar of *res judicata* was available where separate indictments were separately tried, the reasoning of the *Dunn* case itself would make that rule applicable to the trial of a single indictment with several counts.

Petitioner states that in the event this petition for rehearing is denied he expects and intends, in good faith, within the time allowed by Rule 37(b)(2) of the Federal Rules of Criminal Procedure, to apply to the Supreme Court of the United States by petition for a review on writ of certiorari of the decision and judgment of this Court affirming the judgment of conviction against him.

For the foregoing reasons, petitioner requests that a rehearing be granted, and in the event such rehearing is denied petitioner moves the Court to stay the mandate in this cause until the final disposition of his petition to the Supreme Court of the United States for a writ of certiorari.

Respectfully submitted,

JOSEPH B. KEENAN,
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Attorneys for Appellant Irving Ross.

Certificate of Counsel.

We, Joseph B. Keenan and Alvin O. West, attorneys for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay and is believed to be meritorious.

JOSEPH B. KEENAN
ALVIN O. WEST

June 1952.

Order Denying Rehearing

Filed: July 17, 1952

The petition for rehearing filed by appellant Irving Ross is denied.